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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

EDWARD J. KING,
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL

Appellants

v.

PRETERM, INC.,

Appellees

On Appeal from the United States Court of
Appeal for the First Circuit

APPENDIX TO JURISDICTIONAL STATEMENT

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DON R. JAFFEE, M.D., ET AL.,
Plaintiffs

v. CIVIL ACTION
No. 78-1637-C

ALEXANDER E. SHARP, II,
Defendant

PRETERM, INC., ET AL.,
Plaintiffs

v. CIVIL ACTION
No. 78-1653-C

MICHAEL S. DUKAKIS, ET AL.,
Defendants

ORDER

July 28, 1978

CAFFREY, Ch. J.

In accordance with the Opinion filed this day, it is ORDERED, ADJUDGED AND DECREED as follows:

1. Chapter 367, §2, Item 4402-5000 of the Massachusetts Acts of 1978 is enjoined from implementation to the extent that it limits the scope of Medicaid-reimbursed abortions authorized by Section 209 of Public Law 95-205, 91 Stat. 1460, commonly known as the Hyde Amendment;

2. For reasons stated in the Opinion, Civil Action No. 78-1637-C is dismissed as to all plaintiffs except Don R. Jaffee, M.D., and Susan Doe, III, and the members of classes they purport to represent;

3. A hearing on class certification in this matter will be held August 28, 1978, at 2:00 P.M.

/s/
Andrew A. Caffrey, Ch. J.

UNITED STATES COURT OF APPFALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants,
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellees.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellees,
v.
ALEXANDER E. SHARP, II., ET AL.,
Defendants, Appellants.

Before Campbell, J., and
Bownes, J., Circuit Judges.

ORDER OF COURT

Entered: August 7, 1978

Bownes, Circuit Judge. Appellants Preterm, Inc., et al., seek an expanded injunction pending appeal of the District Court's preliminary injunction. The motion is granted and an expedited hearing is set for the September Term.

Focusing on the request for an expanded injunction pending appeal, we conclude that the equities of the situation, often described in terms of irreparable harm, favor relief during this brief interim period. We take judicial notice of the fact that until August 1, 1978, the Commonwealth of Massachusetts provided abortions for a class even larger than that described by the phrase "medically necessary". The restrictions on funding required by the new Massachusetts Law went into effect on August 1, 1978. Where such temporary protection is supported, an appellate court should not delve very deeply into the underlying merits of the case. At this time we are only interested in preserving the status quo. The able oral argument and brief of both parties persuade us that appellants' position, in light of our brief exposure to the issue, is not patently insubstantial. While we may well decide in the defendants' favor after further argument and briefing, we are not now convinced that it is obvious that Congress manifested a clear desire to amend or modify its prior intent to require states to provide "medically necessary" abortions to qualified persons as a requirement for a state's participation in the Medicaid program. The District Court framed its preliminary injunction order to reflect "what the state legislature

would have intended had that body realized that ch. 367 conflicted with the objectives of Title XIX and was for that reason unenforceable as passed," and both parties, at oral argument, requested that such a guideline be incorporated in our decision. This we do.

An expedited appeal from the preliminary injunction and the dismissal of certain putative plaintiffs will be held at the September sitting. Pending our decison of that appeal the injunction issued by the District Court is modified to require the defendants-appellees to provide funding for abortions to "All Medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically-necessary service".

The Court directs the parties, in their briefs, to address inter alia: (1) In Preterm v. Dukakis, both parties should provide the Court with the fullest possible discussion of the Congressional debate leading up to the passage of section 209 of Pub. L. 95-205; 91 Stat. 1460, the so-called "Hyde Amendment". In this regard, the parties might consider submitting a stipulated index, indicating every page in the Congressional record in which the Hyde Amendment was discussed. (2) In Parent's Aid Society v. Sharp, the Court has grave doubts as to whether it has

appellate jurisdiction now to consider the dismissal of certain named plaintifffs. If the parties wish, they may submit briefs on this jurisdictional question.

All briefs for all parties shall be filed by August 25, 1978. The Court sees no necessity for reply briefs.

In accordance with this order, the motion for an expanded injunction pending appeal and for an expedited hearing are hereby granted. The appeals will be heard on Wednesday, September 6, 1978.

By the Court:

DANA H. GALLUP, Clerk.

By: /s/ Francis P. Scigliano
Chief Deputy Clerk.

[Cert. cc: Clerk, U.S.D.C., Mass., cc: Messrs. Reinstein, Rosenfeld, Schmidt, and Ms. Gertner]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DON R. JAFFEE, M.D., ET AL.,
Plaintiffs
v.
ALEXANDER E. SHARP, II,
Defendant

CIVIL ACTION
No. 78-1637-C

PRETERM, INC., ET AL.,
Plaintiffs
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants

CIVIL ACTION
No. 78-1653-C

FINAL JUDGMENT

September 6, 1978

CAFFREY, Ch. J.

This matter came before the Court on defendants' motion to consolidate preliminary injunction with the merits and for the entry of a final order.

Defendants' motion is assented to by counsel for all plaintiffs in both cases. Accordingly, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The hearing held on the motion for preliminary injunction on July 19, 1978 is considered consolidated as a hearing on the merits as well; and

2. The preliminary injunction entered July 28, 1978 is entered effective today as a final judgment in both actions.

Andrew A. Caffrey, Ch. J.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants.,
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellees.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellees.
v.
ALEXANDER E. SHARP II, ET AL.,
Defendant, Appellants.

No. 78-1326.

PARENTS' AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellants.,
v.
ALEXANDER E. SHARP, II.,
Defendant, Appellee.

ORDER OF COURT

Entered September 14, 1978

Upon joint motion,

It is ordered that the respective appeals filed by the parties in district court case number 78-1637 and 78-1653 from the final judgment entered on September 6, 1978 be, and hereby are consolidated with the parties respective appeals docketed in this court as case numbers 78-1324; 78-1325, and 78-1326.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Ms. Gertner and Messrs. Reinstein, Rosenfeld and Ms. Schmidt.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants.,
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellees.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellees.
v.
ALEXANDER E. SHARP II, ET AL.,
Defendants, Appellants,

No. 78-1326.

PARENTS' AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellants.,
v.
ALEXANDER E. SHARP, II.,
Defendant, Appellee.

[D.C. Mass. Nos. 78-1637 & 1653]

JUDGMENT

Entered January 15, 1979

These causes came on to be heard on appeals from the United State District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: That part of the

judgment of the district court enjoining implementation of Stat. 1978, Ch 367, Sec 2, Item 4402-5000, in so far as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment, is affirmed;

That part of the judgment of the district court that dismissed the plaintiffs from District Court Case No. 78-1637-C is vacated and the causes are remanded to the district court for further proceedings in accordance with the opinion of the court filed this day.

No costs.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[cc: Ms. Gertner and Messrs. Rosenfeld, Balliro and Hurley.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants.,
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellees.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellees.
v.
ALEXANDER E. SHARP II, ET AL.,
Defendants, Appellants.

No. 78-1326.

PARENTS' AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellants.,
v.
ALEXANDER E. SHARP, II,
Defendant, Appellee.

ORDER OF COURT

Entered February 2, 1979

Upon consideration of the petition for rehearing,

It is ordered that said petition filed on January 29, 1979 be, and the same hereby is, denied.

By the Court:

DANA H. GALLUP, Clerk.

By /s/ Francis P. Scigliano
Chief Deputy Clerk.

[cc: Ms. Gertner, and Messrs. Rosenfeld, Balliro and Hurley.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., et al.,
Plaintiffs, Appellants,

v.

EDWARD J. KING, et al.,
Defendants, Appellees.

MEMORANDUM AND ORDER

Entered June 21, 1979

Before COFFIN, Chief Judge,
CAMPBELL and BOWNES, Circuit Judges.

Plaintiff-appellants have filed a motion to have this court entered an order modifying its injunction of August 7, 1978, continued in effect by its order of January 29, 1979, so as to enjoin enforcement of Mass. St. 1979, ch. 268 § 1, signed into law on June 12, 1979. Specifically appellants seek to enjoin enforcement of chapter 268, §1, by the state defendants "insofar as it prohibits the expenditure of state funds to pay for

abortions for medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically necessary service." Defendant-appellees oppose the motion as untimely, arguing that chapter 268, § 1 is not yet in effect and will not be in effect until ninety days pass from the date on which it was signed into law, absent an emergency declaration to expedite its implementation. See Opinion of the Justices, 368 Mass. 889, 336 N.E.2d 728 (1975). They further note that the statute may not take effect if an effective referendum petition is filed seeking its repeal and, once again, the Governor does not add an emergency declaration to the legislation.

While appellees' position technically is correct, we are unpersuaded that appellants' motion therefore must be dismissed. In all likelihood, chapter 268, § 1, will go into effect 90 days from June 12, 1979, and the Court can see no reason to invite the delay and uncertainty that will result if appellants are forced to renew their motion after the effective date of the law. Accordingly, this court retains jurisdiction over appellants' motion but reserves judgment pending consideration of the following: by July 11, 1979, the state defendants are ordered to show cause why this court's order of August 7, 1978, or its mandate in

Preterm v. Dukakis, 591 F.2d 121 (1st Cir. 1979), whichever should be in effect when chapter 268, §1 becomes effective, does not render chapter 268, § 1 unenforceable, and why enforcement of chapter 268, § 1 will not place the state defendants in contempt of court. They may, if they see fit, submit affidavits in support of their brief on these questions. Appellants' response will be due July 25, 1979.

By the Court,

/s/ DANA H. GALLUP
Clerk

[cc: Ms. Gertener and Messrs. Reinstein, Rosenfeld, Hurley and Balliro.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants,

v.

MICHAEL S. DUKAKIS ET AL.,
Defendants, Appellees.

Before COFFIN, Chief Judge,
CAMPBELL and BOWNES, Circuit Judges.

MEMORANDUM AND ORDER

Entered August 2, 1979

Plaintiffs-appellants Preterm, Inc., et al., have filed a motion for clarification of the court's order of August 7, 1978. In Preterm, Inc. v. Dukakis, 591 F.2d 121, 134 (1st Cir. 1979), this court held as follows: "The judgment of the district court therefore is affirmed, enjoining implementation of Stat. 1978, ch. 367, § 2, Item 4402-5000, insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment.

The state defendants have admitted in a memorandum filed with this court that the state budget presently in effect, Stat. 1979, ch. 393, Item 4402-5000 contains a restriction on state reimbursement for abortions which is in fact more restrictive than the prior enactment enjoined by this court. Because the state defendants have conceded that Item 4402-5000 is unenforceable, so long as the Commonwealth continues to participate in Title XIX, insofar as it conflicts with our mandate in Preterm, Inc. v. Dukakis, supra, we see no reason not to add to our mandate in that case as follows: We hereby enjoin implementation of Stat. 1979, ch. 393, Item 4402-5000 insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment.

In addition, the court amends its order of August 7, 1978, presently in effect pending disposition of the Supreme Court of appellants' petition for certiorari in Preterm, Inc. v. Dukakis, supra, to further enjoin enforcemnt of ch. 393, Item 4402-5000 insofar as it prohibits the expenditure of state funds for abortions for Medicaid-eigible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortions is medically necessary service.

The court declines at the present time to include chapter 268, § 1, which is not scheduled to go into effect until September 12, 1979, within this order.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[Cert. c. Clerk, U.S.D.C., Mass.; cc: Ms. Gertner and Messrs. Reinstein, Rosenfeld, Hurley and Balliro.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324
78-1325
78-1326

PRETERM, INC. ET AL.,
Plaintiffs, Appellants,

v.

EDWARD J. KING, ET AL.
Defendants, Appellees

DEFENDANTS' NOTICE OF APPEAL

Edward J. King, et al., defendants, appellees, give notice that they appeal from this Court's orders of August 7, 1978, January 15, 1979 (judgment), and August 2, 1979 to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(2) (1976).

By their attorneys,

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Dated: August 20, 1979